

Office of Chief Counsel  
Internal Revenue Service  
**Memorandum**

Number: **200731022**

Release Date: 8/3/2007

CC:ITA:B01:Alrving

PRENO-120813-06

UILC: 165.07-00, 6411.00-00

date: April 24, 2006

to: Senior Team Coordinator  
LMSB-CTM Team 1711, Atlanta, GA

from: Associate Chief Counsel  
(Income Tax & Accounting)

---

subject: Procedure for processing refunds under I.R.C. § 1400N(o), as added by GOZA

This Chief Counsel Advice responds to your request for assistance.

LEGEND

Taxpayer =

ISSUE

Whether a taxpayer may request a tentative refund under § 6411 of the Internal Revenue Code as a result of making an election, under §§ 165(i) and 1400N(o), to deduct a qualifying Hurricane Katrina-related public utility loss in the fifth year preceding the year of the disaster.

CONCLUSION

Yes. The Form 1139, with attachments, filed by the taxpayer is an effective election under §§ 165(i) and 1400N(o), and an effective application for a tentative or "quick" refund under § 6411 that should be processed under the procedures for such applications.

## FACTS

The taxpayer filed a Form 1139, with attachments, on which it elected to deduct in 2000 a public utility loss described in § 1400N(o) and requested a tentative refund of tax paid for 2000.

## LAW AND ANALYSIS

Section 165(i) of the Internal Revenue Code provides that if a taxpayer sustains a loss attributable to a disaster occurring in an area subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Disaster Relief and Emergency Assistance Act, the taxpayer may elect to deduct that loss on the taxpayer's return for the taxable year immediately preceding the taxable year in which the disaster occurred.

Section 1.165-11(e) of the Income Tax Regulations provides that a taxpayer must make the § 165(i) election by filing a return, an amended return, or a refund claim on or before the later of (1) the due date of the taxpayer's income tax return (determined without regard to any extension of time for filing the return) for the taxable year in which the disaster actually occurred, or (2) the due date of the taxpayer's income tax return (determined with regard to any extension of time for filing the return) for the immediately preceding taxable year. The election is irrevocable 90 days after it is made.<sup>1</sup>

Section 6411(a) provides that a taxpayer may file an application for a tentative carryback adjustment of the tax for a prior year affected by a net operating loss carryback, a business credit carryback, or certain capital loss carrybacks. Generally, the application must be filed on or after the date of filing for the return for the year of the loss or credit from which the carryback results and within 12 months after the end of that year. Section 6411(b) provides an expedited procedure for a limited examination of the tentative refund application and for refund or credit within a prescribed, 90-day time frame. Section 6411(d) provides similar rules for certain claim of right adjustments.

The election to deduct a disaster loss in the preceding year under § 165(i) is not generally subject to the tentative or "quick" refund procedures under § 6411.

Section 1400N(o), as enacted on December 21, 2005, by the Gulf Opportunity Zone Act of 2005, P.L. 109-135, provides as follows:

*(o) Treatment of public utility property disaster losses.*

*(1) In general.* Upon the election of the taxpayer, in the case of any eligible public utility property loss--

---

<sup>1</sup> See also Notice 2006-17, 2006-10 I.R.B. 559, granting taxpayers affected by Hurricanes Katrina, Rita, or Wilma additional time to make the election.

(A) section 165(i) shall be applied by substituting "the fifth taxable year immediately preceding" for "the taxable year immediately preceding",

(B) an application for a tentative carryback adjustment of the tax for any prior taxable year affected by the application of subparagraph (A) may be made under section 6411, and

(C) section 6611 shall not apply to any overpayment attributable to such loss.

(2) *Eligible public utility property loss.* For purposes of this subsection--

(A) *In general.* The term "eligible public utility property loss" means any loss with respect to public utility property located in the Gulf Opportunity Zone and attributable to Hurricane Katrina.

(B) *Public utility property.* The term "public utility property" has the meaning given such term by section 168(i)(10) without regard to the matter following subparagraph (D) thereof.

(3) *Waiver of limitations.* If refund or credit of any overpayment of tax resulting from the application of paragraph (1) is prevented at any time before the close of the 1-year period beginning on the date of the enactment of this section by the operation of any law or rule of law (including res judicata), such refund or credit may nevertheless be made or allowed if claim therefor is filed before the close of such period.

In § 1400N(o)(1)(B), Congress specifically provided that an adjustment of the tax for any prior taxable year affected by the extended § 165(i) disaster "throwback" election may be made under § 6411. Thus taxpayers have the option to obtain a refund or credit for such losses either through normal refund procedures, by filing a refund claim on Form 1120X, or by filing an application for a tentative or "quick" refund under § 6411, using a Form 1139. The option to apply for a tentative refund applies to a refund or credit from the fifth year preceding the Hurricane Katrina disaster (2000, for a calendar-year taxpayer) as well as, for example, a refund or credit resulting from carrying back, or carrying over to a year prior to 2005, a net operating loss created by deducting the disaster loss in 2000. If an application for a tentative refund is made, it must be processed within the 90-day time frame set by § 6411.

Section 1400N(o)(3) provides a special extended period for making such an application in the case of a qualified public utility loss described in that section, if the refund or credit would otherwise be barred by operation of law. This provision effectively extends the period of limitations for refund or credit under § 6511, if it would otherwise have terminated, and supersedes any shorter deadlines that might otherwise apply under §§ 165(i) and 6411. The application may be made prior to the filing of the taxpayer's return for 2005, and is timely if made by December 20, 2006, one year from the date § 1400N(o) was enacted.

The Internal Revenue Service is revising Form 1139 and the accompanying instructions, which will reflect certain disaster-related provisions added in response to Hurricanes Katrina, Rita, and Wilma. However, a current Form 1139, such as the one filed by the taxpayer, that makes the § 1400N(o) election and provides the information required by §§ 165(i) and 6411 and the related regulations, is an effective tentative refund application for purposes of § 1400N(o) and should be processed accordingly.

Please call (202) 622-5020 if you have any further questions.

ROBERT M. BROWN  
Associate Chief Counsel  
(Income Tax & Accounting)

By: \_\_\_\_\_  
Andrew M. Irving  
Senior Counsel, Branch 1  
(Income Tax & Accounting)

cc: